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Federal Communications Commission
Office of the Secretary

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From: Marc A. Wites [mailto:mwites@wklawyers.com]
Sent: Wednesday, August 20, 2003 7:33 PM
To: Dan Rumelt
Subject: Filing Regarding 8/18/03 Order on Reconsideration in CG Docket No. 02-278

I am writing to address the FCC's failure to address in both its August 18, 2003 Order on Reconsideration and July 3, 2003 Report and Order the indisputable fact that the FCC's so-called "established business relationship defenses" was based on the FCC's misinterpretation of the Telephone Consumer Protection Act. The FCC's suggestion, both in its August 18, 2003 and July 3, 2003 Order, that an established-business relationship defense ever existed under the TCPA is untenable and contrary to the plain language of the statute. The harm caused by this failure is exacerbated by the FCC's August 18, 2003 order, as it suggests that fax blasters may continue to send faxes until January 1, 2003 under the erroneous conclusion that an established business relationship defense will save them from liability under the TCPA.

The language of the TCPA is clear and unambiguous. The Act defines an "unsolicited advertisement" as one that is sent without the recipient's "prior express invitation or permission." 47 U.S.C. §227(a)(4) Thus, according to the Act, the invitation or permission must be express, and cannot be implied from the nature of the relationship of the sender and the recipient. The FCC's suggestion, both in its August 18, 2003 Order on Reconsideration and July 3, 2003 Report and Order, that an established-business relationship defense ever existed under the TCPA is untenable and contrary to the plain language of the statute. Kondos v. Lincoln Property Co., Case No. 00-08709-H, slip op. at 4 (Tex. Dist. Ct. Dallas Cty. July 12, 2001) (Pet. App. 19) ("Here, the FCC's interpretation of the [established business relationship] defense would act to amend the TCPA's definition of unsolicited advertisement from a fax sent without the recipient's

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'prior express invitation or permission,' to a fax sent without the recipient's prior express *or implied* invitation or permission. That interpretation conflicts with the plain language of the statute. . . . Accordingly, the Court holds that there is no 'EBR' or 'implied permission' exception to the definition of unsolicited advertisement for faxes."); see also Penzer v. MSI Marketing, Inc., Case No.: 01-30868 CA 32 (Fla. 11th Cir. Ct. April 2, 2003) (trial court rejected application of the established business relationship defense to claims alleged the transmission of unsolicited facsimile advertisements).

Because "Congress did expressly provide an established business relationship exclusion in the provisions of the TCPA dealing with telephone solicitations," and did not include the same exemption with respect to facsimile advertisements, "Congress intended to limit the effect of prior invitation only to *express* invitations." Kondos, slip op. at 4-5 (emphasis in original); compare 47 U.S.C. § 227(a)(3) with 47 U.S.C. § 227(a)(4) Moreover, in 47 C.F.R. § 64.1200, the FCC included an established business relationship exception for those initiating a "telephone call" using an artificial or prerecorded message, but did not include this exception in its regulations prohibiting the transmission of unsolicited facsimile advertisements. Compare 47 C.F.R. § 64.1200(a)(2) and 47 C.F.R. § 64.1200(c)(3) with 47 C.F.R. § 64.1200(a)(3).

Thus, the only logical conclusion that can be drawn from this statutory interpretation is that Congress did not intend to create an "established business relationship" exception to the transmission of unsolicited facsimile advertisements. Rodriguez v. U.S., 480 U.S. 522, 525 (1987) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citations omitted); see also Sawnee Elec. Mbrshp. Corp., 544 S.E.2d at160 ("We also recognize that legislative exceptions in statutes are to be strictly construed and should be applied only so far as their language fairly warrants. All doubts should be resolved in favor of the general statutory rule, rather than in favor of the exemption.") (citations omitted).

The FCC's failure to recognize this error will only subject the FCC to ridicule in the courts. While deference is generally afforded to the interpretations of an agency charged with administering a statute, "no deference is due to agency interpretations at odds with the plain language of the statute itself." Public Employee Retirement System v. Betts, 492 U.S. 158, 171 (1989); Heimmermann v. First Union Mortg. Corp., 305 F.3d 1257, 1261 (11th Cir. 2002) (same). Accordingly, where an agency improperly varies the unambiguous language of a statute, "even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language." Betts, 492 U S. at 171. Thus, courts will continue to find the FCC's interpretation in error, as occurred in Kondos v. Lincoln Property Co. and Penzer v. MSI Marketing, Inc.

More importantly, the FCC's erroneous interpretation nullifies the import of its August 18, 2003 Order that grants an extension of time during which business are lead to

believe that they may operate under a so-called "established business relationship defense" that does not, as a matter of law, exist. Only Congress may create law through legislation; the FCC is without any power to rewrite the TCPA to create a defense that does not exist under, and is contradicted by, the plain language of the Act. The FCC's duty to the public mandates that the FCC remedy this misinterpretation of the TCPA.

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